IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

JENNIFER WOLF, Plaintiff, v. RON WILSON CENTER FOR EFFECTIVE LIVING, INC., an Oregon non-profit corporation, Defendant.	No. CV-10-296-HU OPINION & ORDER

Kevin T. Lafky
LAFKY & LAFKY
429 Court Street NE
Salem, Oregon 97301

Jon Weiner
189 Liberty Street, NE, Suite 200
Salem, Oregon 97301

Attorneys for Plaintiff

Ronald G. Guerra
JORDAN SCHRADER RAMIS PC
Attorneys at Law
Two Centerpointe Drive, 6th Floor
Lake Oswego, Oregon 97035

Attorneys for Defendant

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HUBEL, Magistrate Judge:

Plaintiff Jennifer Wolf brings this employment-related action against her former employer, defendant Ron Wilson Center for Effective Living, Inc. Defendant moves to dismiss three of plaintiff's claims for failure to state a claim.

Both parties have consented to entry of final judgment by a Magistrate Judge in accordance with Federal Rule of Civil Procedure 73 and 28 U.S.C. § 636(c). I grant the motion in part and deny it in part.

BACKGROUND

The facts are taken from the Complaint. Defendant is a non-profit corporation which operates various facilities providing services to adults with developmental disabilities, including residential care. Compl. at ¶ 6. Plaintiff was employed by defendant as support staff in defendant's "supportive living" department, from February 22, 2007, until December 30, 2009. Id. at ¶ 7. She was assigned to one or more of defendant's residential care facilities and generally worked full time. Id. at ¶ 7.

In 2008, plaintiff took medical leave protected by the Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2601-2654, and Oregon's Family Leave Act (OFLA), Oregon Revised Statutes §§ (O.R.S.) 659A.150-659A.186, due to a broken ankle. Id. at ¶ 9. That leave ended on or about November 17, 2008. Id.

When plaintiff returned to work on November 17, 2008, she was not reinstated to her job. Id. at ¶ 10. Her work hours were sharply reduced. Id.

In response to what plaintiff believed to be a violation of her rights under FMLA and OFLA, plaintiff retained an attorney who

contacted defendant about the alleged violation. Id. at ¶ 11. In January 2009, plaintiff and defendant resolved plaintiff's claim for the FMLA and OFLA violations arising from plaintiff's 2008 medical leave. Id. at ¶ 12.

On or about March 17, 2009, plaintiff commenced a second medical leave protected by FMLA and OFLA related to her pregnancy. Id. at ¶ 13. Defendant terminated her on December 30, 2009. Id. at ¶ 13.

Based on these facts, plaintiff brings the following claims:

(1) Interference with FMLA rights, in which plaintiff contends that defendant discharged her in retaliation for taking medical leave to which she was entitled, and in retaliation for exercising her right to reinstatement under FMLA; she further alleges that defendant opposed her attempts to obtain unemployment benefits in retaliation for taking medical leave to which she was entitled under FMLA and in retaliation for exercising her right to reinstatement under FMLA; Id. at ¶¶ 15-18;

(2) Retaliation for engaging in protected FMLA activity, in which plaintiff contends that she requested and took leave protected by FMLA, and opposed conduct made unlawful under FMLA when she opposed violation of her FMLA right to reinstatement; defendant allegedly retaliated against her for engaging in this protected activity, both when defendant fired her and when it opposed her attempt to obtain unemployment benefits; Id. at ¶¶ 19-21;

(3) Violation of OFLA in which, based on the prior alleged facts, plaintiff contends that defendant terminated her in retaliation for taking medical leave to which she was entitled

under OFLA and for opposing defendant's violation of her rights as well as opposing her application for unemployment benefits; Id. at ¶¶ 22-24;

(4) Common law wrongful discharge, in which plaintiff contends she was discharged for exercising job-related rights that reflect an important public policy; Id. at ¶¶ 25-27;

(5) Reckless infliction of emotional distress, in which plaintiff alleges she had an employee-employer relationship with defendant, that defendant recklessly engaged in the previously alleged acts causing severe mental or emotional distress in various forms, and that defendant's actions constituted an extraordinary transgression of the bounds of socially tolerable conduct and exceeded any reasonable limit of social toleration; Id. at ¶¶ 28-31; and

(6) Intentional infliction of emotional distress, in which plaintiff alleges that defendant knew the previously alleged conduct would cause severe mental or emotional distress or acted despite a high degree of probability that the mental or emotional distress would result, that defendant's conduct in fact caused plaintiff severe mental or emotional distress from the various foreseeable highly unpleasant emotional reactions, and that defendant's conduct was an extraordinary transgression of the bounds of socially tolerable conduct or exceeded any reasonable limit of social toleration. Id. at ¶¶ 32-35.

STANDARDS

On a motion to dismiss, the court must review the sufficiency of the complaint. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). All allegations of material fact are taken as true and construed in

the light most favorable to the nonmoving party. American Family Ass'n, Inc. v. City & County of San Francisco, 277 F.3d 1114, 1120 (9th Cir. 2002). However, the court need not accept conclusory allegations as truthful. Holden v Hagopian, 978 F.2d 1115, 1121 (9th Cir. 1992).

A motion to dismiss under Rule 12(b)(6) will be granted only if plaintiff alleges the "grounds" of his "entitlement to relief" with nothing "more than labels and conclusions and a formulaic recitation of the elements of a cause of action[.]" Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal quotation omitted). "Factual allegations must be enough to raise a right to relief above the speculative level, . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)[.]" Id. at 1965 (citations and internal quotations omitted).

To survive a motion to dismiss, the complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face[,]" meaning "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (internal quotation and citation omitted). Additionally, "only a complaint that states a plausible claim for relief survives a motion to dismiss." Id. at 1950. The complaint must contain "well-pleaded facts" which "permit the court to infer more than the mere possibility of misconduct." Id.

DISCUSSION

Defendant moves to dismiss the three non-statutory claims of wrongful discharge, reckless infliction of emotional distress, and

intentional infliction of emotional distress.

I. Wrongful Discharge

Defendant moves to dismiss this claim on the basis that plaintiff has adequate statutory remedies under FMLA and OFLA. Many cases from this Court recognize that under Oregon law, there is no right to a common law wrongful discharge claim if existing statutory remedies adequately protect the employment-related right. E.g., Whitley v. City of Portland, 654 F. Supp. 2d 1194, 1224 (D. Or. 2009). Thus, generally, if an adequate statutory remedy exists, a common law wrongful discharge claim based on the same conduct is precluded. Reid v. Evergreen Aviation Ground Logistics Enters., No. CV-07-1641-AC, 2009 WL 136019, at *16 (D. Or. Jan. 20, 2009).

Defendant argues that plaintiff's wrongful discharge claim is precluded by FMLA and OFLA because the statutory relief provided by those statutes is as broad as the relief provided by the common law wrongful discharge claim.

Defendant's position is not supported by other cases from this Court. Most recently, Judge Papak, in a Findings & Recommendation adopted by Judge Brown, noted that under FMLA, a plaintiff is not entitled to emotional distress damages and that the lack of such damages "makes the statutory remedy inadequate because it fails to 'capture the personal nature of the injury done to a wrongfully discharged employee as an individual.'" Maxwell v. Kelly Servs, Inc., No. CV-09-405-PK, 2010 WL 2720730, at *13-14 (D. Or. July 7, 2010) (quoting Earnest v. Georgia-Pacific Corp., No. CV-07-1559-KI, 2008 WL 5111104, at *9 (D. Or. Nov. 25, 2008)). Thus, because the plaintiff was seeking emotional distress damages, Judge Papak

allowed the plaintiff to pursue a wrongful termination claim arising from the allegations that her former employer terminated her employment in retaliation for taking family medical leave, or for demanding reinstatement following her leave. Id. at *14.

In Earnest, the case relied on by Judge Papak, Judge King in turn relied on an earlier case by Judge Ashmanskas to conclude that the lack of emotional distress damages under FMLA and OFLA made the statutory remedies inadequate. Earnest, 2008 WL 5111104, at *9 (citing Rush v. Oregon Steel Mills, No. CV-06-1701-AS, 2007 WL 2417386 (D. Or. Aug. 17, 2007)). Judge King agreed with the analysis in Rush and adopted it as his own. Id.

Defendant argues that no court has ever specifically held that a statute must provide for every single kind of remedy that would be available at common law and that in fact, the Oregon Court of Appeals found the statutory remedy under O.R.S. 659.410(1), prohibiting worker's compensation retaliation, to be exclusive because the legislature's adoption of "virtually all remedies that would have been available at common law lead us to conclude that it intended the statutory remedy to be exclusive." Farrimond v. Louisiana-Pacific Corp., 103 Or. App 563, 567, 798 P.2d 697, 699 (1990). Here, defendant argues, because FMLA and OFLA provide "virtually all" remedies that would have been available under common law, that is sufficient to preclude her wrongful discharge claim.

At the relevant time, the statute at issue in Farrimond capped punitive damages at $2,500. Id. at 567 n.4, 798 P.2d at 699 n.4. The statute still entitled the plaintiff to a jury trial, to obtain equitable remedies of injunction and reinstatement with back pay,

and to obtain compensatory and punitive damages (up to the limit). Id. at 567, 798 P.2d at 699. Thus, the statute provided "virtually all" the remedies available at common law.

Notably, the statute at issue in Farrimond allowed the plaintiff to recover emotional distress damages, which, as the cases from this Court note, "capture the personal nature of the injury." Thus, Farrimond is easily distinguishable.

I agree with the other judges in this Court and conclude that because FMLA and OFLA do not allow for emotional distress damages, which is a component of the damages plaintiff seeks in this case, her common law wrongful discharge claim is not precluded. Thus, I deny the motion to dismiss this claim.

II. Reckless Infliction of Emotional Distress (RIED)

Defendant moves to dismiss this claim contending that Oregon courts do not recognize it. In Davis v. Pacific Saw & Knife Co., No. CV-08-676-HU, 2008 WL 4319981, at *3 (D. Or. Sept. 16, 2008), I held that "[t]here is no cognizable claim under Oregon law for reckless infliction of emotional distress." Id. (citing Snead v. Metropolitan Property and Cas. Co., 909 F. Supp. 775, 779 (D. Or. 1996)).

Opinions issued by other judges in this Court have recognized a narrow set of circumstances in which a RIED claim is, in fact, cognizable. Judge Aiken recently explained that:

> Oregon law allows recovery of damages for reckless infliction of emotional distress under three specific circumstances. See, e.g., Navarette v. Nike, Inc., No. 05-1827, 2007 WL 221865, at *4 (D. Or. Jan. 26, 2007) (discussing when damages may be recovered for RIED in Oregon). First, a plaintiff may recover under RIED when accompanied by physical injury. Drake v. Mut. of Enumclaw Ins. Co., 167 Or. App. 475, 487, n. 3, 1 P.3d 1065 (2000). Second, "Oregon allows recovery for

> emotional distress without accompanying physical injury under narrow circumstances, including when a defendant's conduct infringes on a plaintiff's legally protected interest." Rathgeber v. Hemenway, Inc., 335 Or. 404, 414, 69 P.3d 710 (2003). Third, a plaintiff may recover under either reckless or negligent infliction of emotional distress in circumstances where there is a duty to protect against psychological harm. See Id. (discussing duty to protect from emotional harm in malpractice context) (citing Curtis v. MRI Imaging Servs., 327 Or. 9, 14-15, 956 P.2d 960 (1998)); Simons v. Beard, 188 Or. App. 370, 376, 381-82, 72 P.3d 96 (2003); Shin v. Sunriver Preparatory Sch., Inc., 199 Or. App. 352, 368-69, 111 P.3d 762 (2005) (school owed a heightened duty of care to student to protect from negligently inflicted emotional harm).

Dawson v. Entek Int'l, 662 F. Supp. 2d 1277 (D. Or. 2009).

Here, plaintiff fails to identify her theory of recovery for the RIED claim. There is no allegation of physical injury. The Complaint alleges no "legally protected interest." Moreover, cases discussing RIED claims in Oregon, such as Rathgeber, Drake, and Hammond v. Central Lane Commc'ns Ctr., 312 Or. 17, 816 P.2d 593 (2003) do not provide guidance for interpreting "legally protected interest," and so, do not discuss the required type of such an interest or any limits on such an interest. In fact, while these three cases note the existence of the "legally protected interest" prong of a RIED claim, none found a basis to support it. Furthermore, I agree with Judge Ashmanskas's discussion in Navarette that "[i]n the wake of McGanty [v. Staudenraus, 321 Or. 532, 901 P.2d 841 (1995)], a special relationship between the parties, such as employer-employee, is no longer a basis upon which recovery may be had for RIED." Navarette, 2007 WL 221865, at *3. Finally, there is no allegation of a duty to protect against psychological harm.

A RIED claim without physical injury is allowed under a very

particular set of facts and is recognized only in very narrow circumstances. The facts as asserted by plaintiff in support of this claim are do not state a recognized basis for the claim. I grant defendant's motion as to the RIED claim.

III. Intentional Infliction of Emotional Distress (IIED)

Defendant moves to dismiss this claim on the basis that plaintiff fails to establish that defendant's acts constitute an extraordinary transgression of the bounds of socially tolerable conduct.

To sustain an IIED claim, plaintiff must show that defendant intended to inflict severe emotional distress, that defendant's acts were the cause of plaintiff's severe emotional distress, and that defendant's acts constituted an extraordinary transgression of the bounds of socially tolerable conduct. McGanty, 321 Or. at 563, 901 P.2d at 849; see also Babick v. Oregon Arena Corp., 333 Or. 401, 411, 40 P.3d 1059, 1063 (2002) (to state an IIED claim under Oregon law, plaintiff must prove, inter alia, that defendants' actions "constituted an extraordinary transgression of the bounds of socially tolerable conduct.") (internal quotation omitted).

Conduct that is merely "rude, boorish, tyrannical, churlish, and mean" does not support an IIED claim. Patton v. J.C. Penney Co., 301 Or. 117, 124, 719 P.2d 854, 858 (1986). "[T]he tort does not provide recovery for the kind of temporary annoyance or injured feelings that can result from friction and rudeness among people in day-to-day life even when the intentional conduct causing plaintiff's distress otherwise qualifies for liability." Hall v. The May Dep't Stores Co., 292 Or. 131, 135, 637 P.2d 126, 129 (1981); see also Watte v. Maeyens, 112 Or. App. 234, 237, 828 P.2d

479, 480-81 (1992) (no claim where employer threw a tantrum, screamed and yelled at his employees, accused them of being liars and saboteurs, then fired them all); Madani v. Kendall Ford, Inc., 312 Or. 198, 205-06, 818 P.2d 930, 934 (1991) (no claim where employee terminated for refusing to pull down pants).

In a 2008 case, the Oregon Court of Appeals explained the following parameters of the tort:

> A trial court plays a gatekeeper role in evaluating the viability of an IIED claim by assessing the allegedly tortious conduct to determine whether it goes beyond the farthest reaches of socially tolerable behavior and creates a jury question on liability. . . .
>
> * * *
>
> The classification of conduct as "extreme and outrageous" depends on both the character and degree of the conduct. As explained in the Restatement at § 46 comment d:
>
> > "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."
>
> Whether conduct is an extraordinary transgression is a fact-specific inquiry, to be considered on a case-by-case basis, based on the totality of the circumstances. We consider whether the offensiveness of the conduct exceeds any reasonable limit of social toleration, which is a judgment of social standards rather than of specific occurrences.

House v. Hicks, 218 Or. App. 348, 358-60, 179 P.3d 730, 737-39 (2008) (internal quotations and citations omitted), rev denied, 345 Or. 381 (2008).

Plaintiff argues that the following allegations meet the standard: (1) she was discharged in retaliation for taking medical leave to which she was entitled under FMLA, and in retaliation for exercising her right to reinstatement under FMLA; (2) defendant opposed her attempts to obtain unemployment benefits in retaliation

for taking medical leave to which she was entitled under FMLA, and in retaliation for exercising her right to reinstatement under FMLA; and (3) she settled a previous FMLA dispute with defendant and was subject to retaliation as a result of the exercise of her rights that led to that settlement.

Plaintiff argues that her allegations show "long-term" discriminatory and retaliatory conduct that continued beyond the date of plaintiff's discharge and included not only an attempt to deprive her of her livelihood, but also an attempt to deprive her of the unemployment benefits she needed to survive. Moreover, she notes, defendant did so with the full knowledge that she was a new mother, just back from OFLA and FMLA protected leave, and in the context of what she alleges is a recognized "special" employer-employee relationship. Plaintiff contends that these allegations state a claim for IIED because these are special circumstances which amount to more than "they discharged me because of my protected status."

McGanty made clear that the employer-employee relationship was not relevant to the intent element of an IIED claim. McGanty, 321 Or. at 547-48, 901 P.2d at 850-51. But, as plaintiff noted at oral argument, post-McGanty cases indicate that the employer-employee relationship is relevant to the element of the claim examining the level of conduct necessary to sustain the tort. E.g., Clemente v. State, 227 Or. App. 434, 442, 206 P.3d 249, 255 (2009) ("the courts are more likely to consider behavior outrageous if it is inflicted on the more vulnerable partner in a 'special relationship' such as employer-employee."); House, 218 Or. App. at 360, 179 P.3d at 737 (noting that "precedents identify several contextual factors that

guide the court's classification of conduct as extreme and outrageous[,]" the most important of which is "whether a special relationship exists between a plaintiff and a defendant, such as an employer-employee[.]").

Nonetheless, it remains that Oregon courts have been "very hesitant to impose liability for IIED claims in employment settings, even in the face of serious employer misconduct." Robinson v. U.S. Bancorp, No. CV-99-1723-ST, 2000 WL 435468, at *8 (D. Or. Apr. 20, 2000). As the Clemente court explained:

> In every case in which this court or the [Oregon] Supreme Court has allowed an IIED claim asserted in the context of an employment relationship to proceed to a jury, the employer engaged in conduct that was not only aggravating, insensitive, petty, irritating, perhaps unlawful, . . . and mean-it also contained some further and more serious aspect. In some cases, the employer engaged in, or credibly threatened to engage in, unwanted physical contact of a sexual or violent nature. E.g., Lathrope-Olson, 128 Or. App. at 407-08, 876 P.2d 345; Franklin v. PCC, 100 Or. App. 465, 471-72, 787 P.2d 489 (1990). Employers in other cases repeatedly used derogatory racial, gender, or ethnic slurs, usually accompanied by some other aggravating circumstance. E.g., Whelan v. Albertson's, Inc., 129 Or. App. 501, 504-06, 879 P.2d 888 (1994); Franklin, 100 Or. App. at 471-72, 787 P.2d 489. In yet other situations, the employer exposed the plaintiff to actual physical danger. E.g., Babick, 333 Or. at 413-14, 40 P.3d 1059; MacCrone v. Edwards Center, Inc., 160 Or. App. 91, 100-01, 980 P.2d 1156 (1999), vacated on other grounds, 332 Or. 41, 22 P.3d 758 (2001). In Schoen v. Freightliner LLC, 224 Or. App. 613, 615-20, 629, 199 P.3d 332 (2008), the employer repeatedly subjected the plaintiff to verbal abuse, forced her to do work from which she was medically exempted, and forced her to engage in illegal conduct.

Clemente, 227 Or. App. at 442-43, 206 P.3d at 255 (footnote omitted).

Here, the allegations fail to establish that any such extraordinarily outrageous aggravating factors occurred. Plaintiff was not verbally, sexually, or physically abused or harassed. There

was no name-calling. She was not exposed to violence. She was not repeatedly and viciously ridiculed. Instead, according to the Complaint, she was subjected to repeated discriminatory treatment, retaliation, and post-discharge retaliation in the form of the challenge to her application for unemployment benefits. Even in the context of an employment relationship, these allegations are insufficient. I grant the motion to dismiss the IIED claim.

CONCLUSION

Defendant's motion to dismiss [10] is granted as to the RIED and IIED claims, and is denied as to the wrongful discharge claim.

IT IS SO ORDERED.

Dated this 8th day of November, 2010.

/s/ Dennis James Hubel
Dennis James Hubel
United States Magistrate Judge